3. Where the petition of the plaintiff sets forth such a contract as mentioned above, as a foundation for a decree for the specific performance of such contract, but does not set forth any facts which would show that such contract is not void, such petition does not state facts sufficient to constitute a cause of action.

We suppose it will be conceded that as a rule when a contract appears to be void upon its face, if there should be any fact outside of the contract which would render the contract valid, such facts should be set forth in the pleading of the party claiming the contract to be valid. If so, then as said contract appears to be void, it will devolve upon the plaintiffs to set forth in their petition such facts, *if there be any such*, as will render the contract valid.

The judgment of the court below is affirmed.

KINGMAN, C. J., concurred. BREWER, J., did not sit.

United States Circuit Court. District of Nebraska.

JESSE L. FROST *v.* UNION PACIFIC RAILROAD COMPANY.

Where a servant, under the orders and control of another superior servant, is directed by the latter to do an act not in the usual course of his duties, and, while so engaged, is injured by the negligence of the superior, the master is liable to the servant injured.

THIS was an action brought by the plaintiff to recover damages for an injury to his minor son, resulting in the loss of an arm, while in the employment of the defendants.

DILLON, Circuit J., charged the jury as follows:—

Gentlemen of the jury: That the plaintiff's son was employed by the defendants, and that by an accident his arm was torn off by machinery in the car shop of the defendants, are facts which are admitted. Evidence has been offered tending to show that the defendants, in their works in this city (Omaha), had a car department outside. Mr. Gamble was the superintendent; that under him, and having immediate control in the shop, was a foreman—Mr. Ballou; that under the foreman there were various sets, or, as witness called them, "gangs of men," under the immediate

direction and control of some employee or "boss;" that, among those having control of a set or gang of men working in the shop, was a Mr. Collett (named in the petition); that Collett's duty was to run and superintend the running of a certain machine, or certain machinery, in the shop; that from the time the plaintiff's son was employed he had been working under Collett, obeying his orders and directions; that the chief employment of the son had been at a moulding-machine, receiving and putting away mouldings as they came from the machine.

After the son had been thus engaged for some months, the evidence tends to show that, on the day the accident in question happened, a belt or band connected with the shaft, some fourteen or sixteen feet high, was off the drum or pulley, and needed lacing.

It does not very clearly appear, perhaps, whether the belt thus out of order belonged to the moulding-machine or some other machine near by; but there is evidence tending to show that it was within the scope of Collett's duty to see that it was repaired. The plaintiff has given evidence, which has not on this point been opposed by any evidence produced by the defendant, that, at the time of the accident, Collett, wishing to lace the band at the end near the floor, ordered the plaintiff's son, about sixteen years of age, to ascend a ladder resting on the shaft at the upper end, which shaft was revolving at the rate of 175 or 200 revolutions per minute, and hold or keep the band or belt away from the shaft while he (Collett) laced or sewed it together at or near the floor, and the right arm of the plaintiff's son, while thus engaged, pursuant to the orders of Collett, was caught, or in some way became entangled, in the belt, or drawn between it and the shaft, and was instantly crushed to pieces, and torn from his body.

The plaintiff has offered evidence tending to show that he hired his son to the defendants to work in the car-shop, making the contract with Mr. Gamble, the superintendent; that at the time Mr. Gamble went with the son into the shop and directed him, in Mr. Collett's presence, to help or work under Collett and obey his orders. Upon the evidence, I do not understand it to be claimed by the plaintiff that the accident was caused by the defect in the key (the only defect alleged in the pleadings as to the machinery), and on the trial no mention has been made as to Collett's general skill, fitness, and capacity for the performance of the functions or

duties assigned to him; and the specific ground on which the recovery is claimed is that Collett, in ordering the plaintiff's son to ascend the ladder and perform the service before mentioned, considering the age of the boy and the nature of the service required of him (which is claimed by the plaintiff to have been dangerous to life and limb), was guilty of a wrongful and negligent act, which resulted in the injury to the boy, for which this action is brought.

There is no statute in the state of Nebraska relating to the liability of masters to servants, and the rules regulating such liability must be found in the general principles of the law as declared and settled by the courts.

One of these principles, too often decided to be now denied, is that a master is not liable to his servant or employee for the negligence of a fellow-servant while engaged in the same common employment or service, unless he has been negligent in the selection of the servant in fault, which is a question, as before observed, not in this case. And this doctrine has been extended by many courts to all persons serving the same master and under his control, whether equal, inferior, or superior in grade to the person or servant injured, and the fact that the injured servant was under the control of the servant by whose negligence the injury was caused, has been considered to make no difference in the application of the rule. Although the rule, particularly this extension of it so as to exempt a master for the negligence of a servant, under the scope of his employment, who has the control of another servant, for an injury to the latter, caused by his obeying the orders of his superior, has met with much, and I must say, in my judgment, just and reasonable opposition, yet it has been so often and so generally decided that it is doubtful whether or how far a court, whatever may be its convictions, is at liberty to disregard it. But I do feel free to refuse to extend the rule to cases to which the reason on which it rests does not apply. The reason of the doctrine is that a servant or employee, in making his contract, must be presumed to take into account all the ordinary risks of the business, or risks on which he proposes to enter and obtain a compensation which, upon the average, covers these risks, among which are included the negligence of fellow-servants in the same employment, but he is not presumed

to take into account a risk not included in his employment, and which, therefore, he has no reason to anticipate.

In deciding this case you should determine the nature of the employment on which the plaintiff engaged that his son should serve. If you find that his contract of service or the duties which he engaged to perform were such that it was within the contract or within the scope of those duties that the son should assist in the repair of the machinery in question, and that the son, when injured, was in the discharge of a duty or service covered by the contract of employment, then the company is not liable for the negligence of Collett (if he was negligent) with respect to ordering the son to ascend the ladder and hold the belt away from the shaft.

But I draw this distinction: If the work which the son was ordered by Collett to do was not within the contract of service; was not one of the duties which fell within the contract of employment, but was outside of it, then Collett in ordering the service in question (if he was in the scope and course of his duties and power at the time) must, as to this act, be taken to represent the company (which he is presumed to constructively represent), and if that act was wrongful and negligent, as hereinafter defined, the company, his employer, would be liable for the damages caused by such negligent and wrongful act; and the principle before adverted to that the master is not liable for the neglect of a co-employee in the same service has no application, or no just application to such a case; for in such a case they are not, in my judgment, in any proper sense "fellow-servants" in the same common service.

This action is based essentially upon the alleged negligence of Collett, and the negligence imputed consists in the nature of the order which he gave the plaintiff's son. If, under the foregoing instructions, you find that the company is liable in respect of the act of Collett in ordering the boy up to the shaft, you will then have to inquire whether that act was wrongful and negligent.

Now, gentlemen, that depends upon the circumstances of the case, which you should attentively consider.

An employer is not an insurer of the lives and limbs of his men, but he does impliedly engage that he will not expose them to unnecessary and unreasonable risks to life, or serious bodily injury. Negligence is the omission to do something which a rea-

sonable, prudent man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do under all the circumstances surrounding and characterizing the particular case; and in this case it is the duty of the jury to consider the age and experience and extent of judgment of the boy, and the nature of the service demanded of him, in respect to its being hazardous to life or limb or otherwise.

If a reasonable and ordinarily prudent man would not have ordered a boy of his age, under the circumstances, upon such a service, because it was dangerous, then it was a negligent and wrongful act; but if it could not by a man of reasonable prudence and sagacity have been foreseen, that the service demanded was perilous, the company is not liable, although the act required of the boy was one not falling within the scope of his employment.

This is an action by the father for loss of service of the son, and under the pleading he can only recover pecuniary damages, which includes actual or necessary expenditures, for supplies for the son during his recovery; the value of his and his family's necessary attention to the son, and the value of the loss of the services of the son from the date of the accident down to the time of trial.

Court of Common Pleas of the City of New York.

THE PASSAIC MANUFACTURING COMPANY *v.* WILLIAM HOFFMAN ET AL.

Under the Statute of Frauds a distinction is made between a contract for the sale of goods and one for work and labor in the manufacture of them. The former only is made void by the statute unless it be in writing.

Where the contract is for an article coming under the general denomination of goods, wares, or merchandise, and is made with one who makes and sells that kind of article to all who traffic in it, the quantity required and the price being agreed upon, it is a contract of sale, whether the maker and vendor has the required quantity on hand or has to make it afterwards.

But if what is contemplated by the agreement is the skill, labor, care, or knowledge of the maker; or if it would not have been produced except for the order; or if it is ordered at a certain price with the knowledge that the maker is not supplied and will have to make it; or if, when produced, it is unfitted for sale as a general article of merchandise, being adapted only for use by the person ordering it, then the contract is one for work and labor, and not within the statute.

The cases on this subject examined and discussed by DALY, C. J.